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Supreme Court of the United States

October Term, 1949

No. 411

CAULDWELL-WINGATE COMPANY, INC., POIRIER & McLANE CORPORATION and PORT CHESTER ELECTRICAL CONSTRUCTION CORPORATION,

Petitioners,

against

MARY E. PERSON, as Administratrix of the Goods, Chattels and Credits of WILLIAM S. PERSON, Deceased,

Respondent.

Brief for Mary E. Person, as Administratrix of the Goods, Chattels and Credits of William S. Person, Deceased, in Opposition

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349

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Opinion Below

The opinion of the United States Court of Appeals (R. 426-433) is reported in 176 F. (2nd)) 237.

Jurisdiction

The petition for a writ of certiorari was filed October 20, 1949. The jurisdiction of this Court is invoked by the petitioners under Section 240 (a) of the Judicial Code as amended. See also Rule 38 (5) (b).

Questions Presented

1. Whether the United States Court of Appeals has decided an important question of local law in such a manner as to conflict with applicable local decisions.

2. Whether the United States Court of Appeals erred in deciding that the respondent made out a *prima facie* case which should have been submitted to the jury in the United States District Court.

3. Whether the United States Court of Appeals erred in deciding that the respondent adduced sufficient evidence in the United States District Court to support a jury verdict against all the petitioners.

4. Whether the United States Court of Appeals erred in deciding that the respondent adduced sufficient evidence to justify a jury in finding that the petitioner, Port Chester, was engaged in the erection and construction of high tension wires which were inherently dangerous instrumentalities within the meaning of New York law.

5. Whether the United States Court of Appeals erred in deciding that the petitioners, Cauldwell-Wingate and Poirier & McLane, were under a duty to carefully supervise and inspect the work of their subcontractor, Port

Chester, because the work was inherently dangerous and therefor under New York law that duty could not be delegated.

6. Whether the United States Court of Appeals erred in deciding that the question of proximate cause of the decedent's death was plainly one of fact for the jury to decide.

7. Whether the United States Court of Appeals erred in deciding that the presence of a second unlawful act, if any there was, was legally irrelevant under New York law unless the second unlawful act was so unexpected that injury was not to be a reasonably foreseeable result of the first unlawful act.

8. Whether the United States Court of Appeals erred in deciding that the burden, under New York law, was upon the petitioners to prove that they had performed their work in accordance with plans and specifications and to satisfy a jury that such plans and specifications, if any there were, were not so patently dangerous that competent engineers would have thought them improper.

9. Whether the United States Court of Appeals erred in reversing the United States District Court, in remanding this cause for a new trial and in denying the petitioners a re-hearing.

Statement

The following statement is deemed necessary to correct some inaccuracies and to supply some important omissions in the petitioners' statement.

This action was brought by the respondent's intestate on behalf of herself and four dependent children to recover damages for the wrongful death of her husband pursuant to Section 130 of the Decedent Estate Law of New York (R. 18-20).

The petitioners rested at the close of the respondent's case without introducing any evidence whatsoever and then moved for a dismissal of the complaint and for a directed verdict. The trial judge granted their motions (R. 412-416).

The respondent established upon the trial that the work performed by these petitioners was inherently dangerous (R. 45, 56, 84, 176, 328).

That the type of construction used by the petitioners on pole No. 1422 was improper (R. 358).

That the jumper had been placed by the petitioner, Port Chester, between the two conductors on pole 1422 in such a manner as to introduce an extreme hazard to anyone working on the pole (R. 358).

That the jumper used by the petitioner, Port Chester, was a piece of bare, soft, malleable copper wire, uninsulated and charged with a deadly current of 2300 volts of electricity (R. 242, 243).

That this jumper was installed by the petitioner, Port Chester, suspended in mid air without any support whatsoever, either in the form of an insulated porcelain pole top or side top pin, which were in common use at the time and were and are used to prevent jumpers from bending sagging or falling down or in any way making contact with any metal or other object on a pole (R. 111, 122, 139, 190, 191, 295, 321, 323, 324).

That this jumper was installed by the petitioner, Port Chester, in this condition within a proximity of two inches

to a metal plate, also known as a metal square washer, which held fast an eye bolt, to which bolt was attached a guy line leading to the ground (R. 181, 204, 205).

The statement in petitioners' brief (Pet. 3) that the guy cable was bolted six inches below the high tension wire is not to be confused with the square metal plate or washer. The metal plate extended beyond the bolt. Before the highly charged bare jumper sagged, it was within a proximity of two inches to the plate (R. 180, 181, 204, 205). The jumper thereafter sagged, fell two inches and made contact with the metal plate, thereby charging the upper portion of the guy line with 2300 volts of electricity (R. 43, 76, 129, 130, 179, 180, 393, 400).

The uncontradicted testimony of the witness (Shaw), a highly competent expert, shows that there could not be any question, even as between experts, as to the negligent construction of this jumper because it was hazardous, the worst kind of a hazard (R. 359-361, 386, 387, 395, 401).

That the bolt which ran through the pole and held the dead end bell insulators and long high tension wires to which the jumper had been attached, was also negligently installed by the petitioner, Port Chester (R. 254, 259, 291, 292).

That this bolt had a nut and washer missing on the eye side and its threads on the other side were stripped. The threads on the nut attached thereto were also crossed. There were spaces on both sides of the bolt, as a result of which the dead end bells themselves were loose, enabling them to twist, turn, swing and sway. The wires attached thereto, including the jumper, were all charged with 2300 volts of electricity (R. 182-184). The witness (Burton) says that because of this condition, the jumper dropped down and made contact with the metal plate (R. 188-190, 202-205, 254, 291, 292).

The jumper and the high voltage wires were installed by Port Chester (R. 328-330). In its original position and before it fell there was a space of only two inches between the jumper and the metal plate (R. 181).

That a guy line is never used to transmit electricity. It is a heavy cable used to hold the pole in position and for no other purpose (R. 60, 68, 110, 132, 176).

The guy line had a strain insulator in it at a point approximately twenty feet from the ground. This protected animals and people on the ground from a short circuit, but it afforded no protection to workers on the pole because it did not contain a strain insulator at a point beneath the high tension wires (R. 392).

That the bare jumper fell two inches, made contact with the metal plate and energized the upper portion of the guy line with 2300 volts of electricity because it was wholly unsupported and uninsulated and had been placed within a proximity of two inches to the plate. Further, the bolt itself, which held the entire rigging was loose. The bells were loose, causing the high tension wires and the jumper attached thereto to swing and sway. This is what killed the decedent. This was the type of construction used by the petitioners (R. 181-184, 190, 191, 203, 254, 259, 291, 292).

Decedent climbed the pole and grasped the upper portion of the upper guy line in order to adjust himself in his belt. He was not working in the high tension area. He was working in the low tension area. The secondary wires had only 110 volts of electricity in each one. As he grapsed the guy line, which must at all times be neutral, 2300 volts of electricity passed through his body and killed him instantly (R. 36, 70, 72, 84, 86, 123, 127).

There was no reason for the petitioners to use this type of construction in the first place, because it was improper and hazardous (R. 358).

A proper type of construction would have been to use a single high tension line running from pole 1426 to accident pole 1422 to pole 776, supported by a single insulated ridge pin attached to accident pole 1422 or supported by a pair of ordinary double wooden buck cross arms. This type of construction would have been economical and safer (R. 359-361, 393).

There was no evidence to indicate any intervening cause between the day the petitioners completed the work and the day of the accident.

There are no plans and specifications in evidence to show that the petitioners performed their work in accordance therewith.

The burden was upon the petitioners to produce them if any there were. They promised to produce them, but never did (R. 330). They rested without introducing any evidence at all.

The petitioners, Cauldwell-Wingate and Poirier & McLane, did not even conduct the usual pole top or climbing inspection upon completion of the work to see to it that the work was properly done (R. 338, 381).

Argument

1. This case involves the original erection, construction and supervision by the petitioners of high voltage electric wires charged with a deadly current of 2300 volts. That this type of work comes within the category of inherently dangerous instrumentalities there can be no question under New York law. See *Van Leet* v. *Kilmer* (252

N. Y. 454); *Morhard* v. *Richmond Light & R. R. Co.* (111 A. D. 353); *Webster* v. *Richmond Light & Railroad Co.* (158 A. D. 210); *Buell* v. *Utica Gas & Electric Co.* (259 N. Y. 443); *Braun* v. *Buffalo General Electric* (200 N. Y. 484); *Caglione* v. *Mt. Morris Electric Light Co.* (56 A. D. 191); *Ferrari* v. *N. Y. C. R R. Co.* (244 A. D. 182, affd. 250 N. Y. 527); *Burrows* v. *Livingstone Niagara Power Co.* (217 A. D. 206, affd. 244 N. Y. 548).

2. Liability in such cases is not incident to operation and control.

Where one performs work which is of an inherently dangerous character, in a negligent manner, he cannot evade responsibility by contending that he was not in control of the instrumentality at the time of the accident. See *MacPherson* v. *Buick Motor Co.* (217 N. Y. 382); *Thomas* v. *Winchester* (6 N. Y. 397); *Statler* v. *Ray Mfg. Co.* (195 N. Y. 478); *Procopowicz* v. *11 West 42nd St.* (289 N. Y. 350); *Regan* v. *825th St. Corp.* (287 N. Y. 179); *De Haen* v. *Rockwood Sprinkler Co.* (258 N Y. 350).

It is interesting to note that the petitioners make no mention, either in their petition for a writ, or in their supporting brief of the cases cited *supra*. It is well known that these cases are landmarks in the New York law. In such cases liability is definitely not incident to control.

Wilks v. *N. Y. Telephone Co.* cited by the petitioners (Pet. 6) sustains respondent's claims. There the court found that the "Federal Company" was not in control of the defective system at the time of the accident. The company had turned over its defective system to another company. The court held (P. 362), "If the evidence sustains the charge that the defendant "Federal company" did erect the wires in such a manner as to make it a menace to others, the verdict against it must be sustained."

The United States Court of Appeals in the instant case applied local law in conformity with the New York decisions.

3. The petitioners, Cauldwell-Wingate and Poirier & McLane, were general contractors. They had subcontracted the work of erecting an outside electrical distribution system to their subcontractor, Port Chester. The work involved the erection of high voltage lines which are definitely inherently dangerous instrumentalities. They were under a duty to inspect and supervise the work of Port Chester and to see to it that it was properly done. The contractors cannot escape responsibility in such a case. They cannot delegate such a duty to others. It is a non-delegable duty under New York law. See *Engel* v. *Eureka Club* (137 N. Y. 100); *Rohlfs* v. *Weil* (271 N. Y. 444); *Hanley* v. *Central Savings Bank* (255 A. D. 542, affd. 280 N. Y. 734); *Kuhn* v. *P. J. Carlin Construction Co.* (154 Misc. 892); *Walters* v *Rao Electrical Co.* (289 N. Y. 57); *Semanchuck* v. *5th Ave. and 37th St. Corp.* (290 N. Y. 412).

4. In the instant case there were no intervening causes to break the chain of causation between the time that the petitioners completed their work and the date of the accident. If any there were, they must be such under New York law as not to have been reasonably foreseen at the time the petitioners erected the jumper and the high tension wires. Here the subcontractor erected a jumper within a proximity of two inches to a metal plate. The jumper was charged with 2300 volts of electricity. It was bare, soft, malleable copper wire, uninsulated and wholly unsupported by any form of safety device such as a simple insulated porcelain pole top pin or side top pin. Under the circumstances, it was clearly foreseeable that such a jumper would bend, sag or fall down and make contact with the metal place two inches below and that it would thereby charge the metal plate and the metal guy wire leading therefrom with such a dangerous

voltage. That is exactly what happened (R. 181, 190, 191, 242, 243). See *Carlock* v. *Westchester Lighting Co.* (268 N. Y. 345).

5. The petitioners urge performance in accordance with plans and specifications. There is not a single plan or specification in evidence to prove that the rigging on accident pole 1422 was done in accordance therewith. The petitioners rested at the close of the respondent's case without introducing any evidence at all (R. 412, 415). The petitioners did not raise such a defense in their pleadings (R. 9-15).

Under New York law, the defense has the burden of pleading and proving affirmatively the defense of plans and specifications. Further, they must also show that they relied upon them and that a reasonable inspection of such plans and specifications by competent persons would not disclose that they were faulty or improper. The petitioners did not do this. See *Hardie* v. *Boland Co.* (205 N. Y. 336); *Ryan* v. *Feeney & Sheehan Building Co.* (239 N. Y. 43); *Sheridan* v. *Rosenthal* (206 A. D. 279); *Hooey* v. *Airport Construction Co.* (253 N. Y. 486).

6. The cases cited by the petitioners do not apply. *Western Union Telegraph Co.* v. *Postum* (256 U. S. 662) (Pet. 6) deals with common law liability of a telegraph Co. for the negligent delay of a message. *U. S.* v. *General Motors Corp.* (323 U. S. 373) (Pet. 9) involves the interpretation of the 5th Amendment of the United States Constitution and was before this Court because the case presented a question upon which the Federal Courts were in conflict. There is no such question in the instant case. *Wilks* v. *N. Y. Telephone Co.* (243 N. Y. 351) (Pet. 10) has not been adequately set forth. There the "Federal Company," although out of control at the time of the accident, was held responsible. The court found (P. 362) that "If the evidence sustains the charge that the Federal company

did erect the wire in such a manner as to make it a menace to others, the verdict against it must be sustained." *Covert* v. *Cranford* (141 N. Y. 521) (Pet. 11) does not deal with an inherently dangerous instrumentality. *Mayor* v. *Cunliff* (2 N. Y. 174) (Pet. 11) held no recovery because of lack of privity between the wrong doer and the injured. This is not New York law today. *Cullings* v. *Goetz* (256 N. Y. 287) (Pet. 12) is a landlord and tenant case and belongs to that group of New York cases which predicate liability upon operation and control. It does not deal with inherently dangerous instrumentalities. *Muscelli* v. *Frederick Starr Contracting Co.* (296 N. Y. 330) (Pet. 12) deals with the application of the "Osceola" doctrine as to unseaworthiness and not with tort liability in negligence. *Stein* v. *Pershing Square Bldg. Co.* (191 Misc. 30) (Pet. 12) is another landlord and tenant case having no application. In *Iacono* v. *Frank and Frank Contracting Co., Inc.* (259 N. Y. 377) (Pet. 12) the court found (P. 381) that "Neither of the defendants had caused its installation, or supplied it for the use of the subcontractor; neither of them had ever possessed or operated." There the defendants neither created, controlled or supplied the instrumentality for use. *Kilmer* v. *White* (254 N. Y. 64) and *Zolezzi* v. *Bruce-Brown* (243 N. Y. 490) (Pet. 12) are also landlord and tenant cases. The *Zolezzi* case specifically holds the landlord not liable because he did not erect the sign. *Virginian Railway Co.* v. *Mullens* (271 U. S. 220) (Pet. 14) deals with a nuisance which the defendant neither created nor controlled. *Breen* v. *N. Y. Central and H. R. R. Co.* (109 N. Y 297) (Pet 15) is a passenger case which does not apply in fact or in law.

In the case at bar the petitioners are the original actors. They perpetrated the original wrongful act. They, in the language of Mr. Justice Cardozo in *De Haen* v. *Rockwood Sprinkler Co.* (258 N. Y. 350) were the ones who placed an engine of destruction in a position where a heedless touch by another awoke its destructive powers.

7. The opinion of the United States Court of Appeals (R. 426-441) is in conformity with New York law. That court applied local law in accordance with the doctrine of *Erie R. R. Co.* v. *Tompkins* (304 U. S. 64).

8. The trial court erred seriously when it ignored the practice of the United States District Court for the Southern District of New York and refused to allow the respondent's case to go to the jury on triable issues of fact. The trial court should have reserved decision on a motion to dismiss or for a directed verdict until all of the evidence was in and thereby prevent needless expense and circuity of action. There were clearly triable issues of fact to be submitted to the jury in accordance with the rulings of this Court. See *Lumbra* v. *U. S.* (290 U. S. 552); *Gunning* v. *Cooley* (281 U. S. 90); *Gulf M. & N. R. Co.* v. *Wells* (275 U. S. 455); *Chicago, Milwaukee & St Paul R. Co.* v. *Coogan* (271 U. S. 472). See also Hughes Federal Practice (Vol. 6, Section 3825, P. 363), "It is the duty of the court, in considering a motion to direct a verdict to take that view of the evidence most favorable to the party against whom it is desirable that the verdict shall be directed, and to determine the matter from that evidence, and reasonable and justifiable inferences therefrom."

9. There is no distinction under New York law between negligence and a nuisance which has its origin in negligence. See *MacFarlane* v. *City of Niagara Falls* (247 N. Y. 340); *Delaney* v. *Philhern Realty Holding Corp.* (280 N. Y. 461). In the language of Cardozo, Ch. J., in the *MacFarlane* case (P. 345) "Very often the sufferer is at liberty to give to his complaint either one label or the other. It would be intolerable if the choice of a name were to condition liability."

The respondent's case is not based upon the theory of a nuisance or upon *res ipsa loquitur* as the petitioners seem to urge (Pet. 5, 11).

The respondent's case is based on negligence. The original negligent construction by Port Chester of an inherently dangerous object in such a manner that the same was a menace to others in general and to the respondent's intestate in particular. It was the duty of the petitioners, Cauldwell-Wingate and Poirie & McLane, as general contractors, to see to it that Port Chester performed its work with a high degree of care and under New York law that duty could not be delegated.

10. The petitioners urge, as an added reason for the granting of this petition, that otherwise a prudent contractor would have to carry liability insurance for all future periods (Pet. 15, 16). This argument is untenable apart from the fact that they are substantial corporations.

11. The petitioners do not present any substantial question requiring review by this Court. See *McArthur* v. *U. S.* (315 U. S. 787); *Zucht* v. *King* (260 U. S. 174).

The United States Court of Appeals has decided that the respondent made out a *prima facie* case which should have been submitted to the jury under local law (R. 426-441). This question should not be subject to review by the United States Supreme Court. See *U. S.* v. *Socony-Vacuum Oil Co.* (310 U. S. 150, re-hearing denied 310 U. S. 658).

The petitioners will have ample opportunity to defend themselves once again upon the new trial.

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court. It is therefore respectfully submitted that the same should be denied.

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